



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

March 25, 2009

**MEMORANDUM**

**SUBJECT:** Notice of Citizen Suit filed under the Clean Air Act

**FROM:** *for* *Deborah Garber*  
Deborah Garber  
Section Chief, MM Branch II, Section I  
Office of Regional Counsel  
ORC Liaison to AE Division

**TO:** George Czerniak, Chief  
Air Enforcement & Compliance Assurance Branch  
Air and Radiation Division

Enclosed please find a Notice of Intent to Sue concerning "Sierra Club vs. City of Holland, Michigan and Holland Board of Public Works, for alleged violations of the Clean Air Act.

This notice is provided in the event you wish to pursue this matter.

Please call me at 6-6610 if you have any questions.

Attachment

64

FILED - GR

December 15, 2008 8:35 AM

RONALD C. WESTON, SR., CLERK  
U.S. DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
BY: ald /

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

SIERRA CLUB,  
85 Second Street, 2<sup>nd</sup> Floor  
San Francisco, CA 94105

Plaintiff,

vs.

CITY OF HOLLAND, MICHIGAN  
270 S. River Ave  
Holland, MI 49423, and

HOLLAND BOARD OF PUBLIC WORKS  
625 Hastings Avenue  
Holland, MI 49423

Defendants.

Civil Action No.

1:08-cv-1183

Paul L. Maloney  
Chief U.S. District Judge

COMPLAINT

Plaintiff, Sierra Club, by its undersigned attorneys, alleges as follows:

INTRODUCTION

1. This is a civil action for civil penalties, declaratory and injunctive relief, with costs and fees, under the Clean Air Act ("the Act" or "CAA"), 42 U.S.C. §§ 7401, *et seq.*
2. Sierra Club seeks an order requiring the Defendants, the City of Holland, Michigan and the Holland Board of Public Works, to comply with the requirements of the Act at the James De Young Generation Station ("the De Young Plant") and to forfeit penalties for violations of the CAA at the De Young Plant.

COURTWORK

3. The De Young Plant is a coal- and natural gas-fired power plant that emits thousands of tons of carbon dioxide, nitrogen oxides and sulfur oxides every year as well as significant amounts of particulate matter and carbon monoxide. Those pollutants contribute to climate change, respiratory distress, cardiovascular disease, and premature mortality. Nitrogen oxides and sulfur oxides in the air also contribute to acid rain, which sterilizes lakes and damages property. Presence of those pollutants in the atmosphere is also associated with increased hospital admissions and emergency room visits.

4. On numerous occasions, Defendants modified and thereafter operated the generating units at the De Young Plant without first obtaining appropriate permits authorizing that construction, without meeting emission limits that are "best available control technology," and without installing appropriate technology to control emissions of nitrogen oxides, sulfur dioxides, particulate matter, and other pollutants as required by the Act and its implementing regulations.

5. As a result of the Defendants' operation of the De Young Plant following those unlawful modifications, and in the absence of appropriate controls, unlawful amounts of various pollutants have been, and continue to be, released into the atmosphere, aggravating air pollution locally and far downwind from this plant.

6. An order from this court directing Defendants to obtain the required permits, which necessitate compliance with best available control technology limits, installation of modern pollution controls and a demonstration to the appropriate regulatory agencies that emissions from the facility will not result in unlawful amounts of air pollution, will improve air quality for thousands of Americans, including Sierra Club's members. It will also reduce illness

and protect lakes and streams from further degradation due to the fallout from acid rain and mercury deposition.

7. If Defendants comply with the Act, including the Prevention of Significant Deterioration ("PSD") program, 42 U.S.C. §§ 7470-7479, and the Nonattainment New Source Review ("NNSR") program, 42 U.S.C. §§ 7501-7515, the De Young Plant will significantly decrease its annual air pollution emissions.

### **PARTIES**

8. Plaintiff Sierra Club is an incorporated, not-for-profit organization with its headquarters at 85 Second Street, 2nd Floor, San Francisco, California and its Michigan Chapter Office at 109 E. Grand River Avenue, Lansing, Michigan. Its purpose is to preserve, protect, and enhance the natural environment. Its mission includes reducing and eliminating pollution from the mining, combustion, and waste disposal of coal, which negatively affects Sierra Club's members as well as of the members of the public. Sierra Club has over 1.3 million members and supporters nationwide, including approximately 18,000 members in Michigan.

9. Defendant City of Holland, Michigan is a municipality in the State of Michigan that owns the De Young Plant.

10. Defendant Holland Board of Public Works is a division of the City of Holland that provides utility services to the Holland area and operates the De Young Plant.

11. Each of the defendants is a "person" within the meaning of Sections 302(e) and 304(a)(3) of the Act, 42 U.S.C. § 7602(e), 7604(a)(3).

**STANDING**

12. Sierra Club has members who live, work, and recreate in the City of Holland and Ottawa County, Michigan, as well as other areas downwind from the De Young Plant. These members are impacted negatively by air pollution emissions from the De Young Plant. The health and welfare of Sierra Club's members, as well as their enjoyment of outdoor activities, has been and continues to be harmed by air pollution from the De Young Plant.

13. An order of this Court enjoining Defendants from operating the De Young Plant and/or requiring Defendants to procure a PSD and/or NNSR permit with current best available control technology standards, or lowest achievable emission rate limits, for the major modifications that have been made at the De Young Plant will redress the injuries to Sierra Club's members because of the recent significant advances in pollution control technologies that will be required under a new permit.

**JURISDICTION AND VENUE**

14. This Court has subject matter jurisdiction over the claims set forth in this complaint pursuant to 42 U.S.C. § 7604(a), 28 U.S.C. §§ 1331, 1355, and 2201. The relief requested by the Plaintiff is authorized by statute in 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 7604.

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) because the Defendants reside in, and, all or a substantial part of the events or omissions giving rise to the claims herein occurred in the Western District of Michigan. Venue is also proper pursuant to 42 U.S.C. § 7604(c)(1) because this action is for violations at the De Young Plant, which is located within the Western District of Michigan.

16. No prior notice is required for the claims set forth below.

**GENERAL ALLEGATIONS**

17. The Act requires that the United States Environmental Protection Agency (EPA) promulgate National Ambient Air Quality Standards (NAAQS), which are upper limits on air pollution, to protect public health and welfare, 42 U.S.C. § 7409.

18. The Act also requires each state to designate those areas within its boundaries where the air quality meets or exceeds NAAQS for each pollutant. An area that meets the NAAQS for a particular pollutant is termed an "attainment" area, whereas an area that exceeds the NAAQS is a "nonattainment" area. Areas for which there is insufficient information to determine compliance with NAAQS are "unclassifiable," 42 U.S.C. § 7407(d).

19. The De Young Plant is located at 64 Pine Avenue, Holland, Ottawa County, Michigan.

20. At the times relevant to this complaint, Ottawa County was classified as either "attainment" or "unclassifiable" for all pollutants with the exception of the pollutant ozone.

21. Ottawa County was classified as "nonattainment" for ozone from approximately 1978 to 1996 and again from June 15, 2004 to May 16, 2007. *See* 69 Fed. Reg. 23857 (April 30, 1997); 72 Fed. Reg. 27425 (May 16, 2007).

22. Defendants are government entities who own and are responsible for the operations of the De Young Plant.

23. The De Young Plant consists of three coal- and natural gas-fired electrical generating boilers and associated equipment known as Units 3, 4 and 5. Together, these three boilers have the capability of generating 60 megawatts ("MW") of electricity.

24. Boiler 3 has a capacity of approximately 11.5 MW and was manufactured in 1950.
25. Boiler 4 has a capacity of approximately 19 MW and was manufactured in 1960.
26. Boiler 5 has a capacity of approximately 29.5 MW and was manufactured in 1967.
27. Coal is the predominant fuel for all three units at the De Young Plant.
28. The De Young Plant has the potential to emit in excess of 100 tons per year of the following pollutants: carbon dioxide, nitrogen oxides, sulfur dioxide, carbon monoxide, and particulate matter.
29. The De Young Plant is a "major emitting facility" as that term is used in 42 U.S.C. § 7475(a) and a "major stationary source" as that term is used in 40 C.F.R. § 52.21(a)(2), (b)(1), 40 C.F.R. § 51.165(a)(1)(iv), Appendix S and Michigan Rule 220.
30. Any major stationary source in an attainment or unclassifiable area that intends to construct a "major modification" must first obtain a PSD permit, 42 U.S.C. § 7475(a) and 40 C.F.R. § 52.21.
31. Any major stationary source in a nonattainment area that intends to construct a modification must first obtain an NNSR permit, 42 U.S.C. §§ 7502(c)(5), 7503, 40 C.F.R. § 51.165, Appendix S, and Michigan Rule 220.

**FIRST CLAIM FOR RELIEF**

(Commencing Construction of a Major Modification Without a PSD Permit)

32. Paragraphs 1 through 31 are realleged and incorporated herein by reference.
33. At various times, Defendants commenced construction of one or more major modifications, affecting the boilers and associated equipment at the De Young Plant. Each such

major modification resulted in significant net emission increases, as defined by 40 C.F.R. § 52.21(b)(3)(i), of one or more pollutants.

34. Defendants continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), and the PSD regulations set forth in 40 C.F.R. § 52.21 and in the Michigan State Implementation Plan, Mich. Admin. Code § 336.2801, *et seq.*, by, *inter alia*, their continuing failure to obtain the required PSD permit for major modifications to the De Young Plant. In addition, Defendants are in continuing violation of requirements to comply with best available control technology, demonstrate that construction or modification will not cause or contribute to air pollution in violation of any NAAQS or any specified incremental amount, and perform an analysis of the ambient air quality in the area, as required by 40 C.F.R. § 52.21(m) and Mich. Admin. Code § 336.2811, 336.2813.

35. Based upon the foregoing, Defendants have violated and continue to violate Section 165(a) of the Act, 42 U.S.C. § 7475(a), 40 C.F.R. § 52.21, and Mich. Admin. Code §§ 336.2801 *et seq.* Unless restrained by an order of this court, these and similar violations of the PSD provisions of the Act will continue at the De Young Plant.

36. The PSD violations set forth above subject Defendants to injunctive relief and civil penalties, 42 U.S.C. §§ 7413 and 7604.

**SECOND CLAIM FOR RELIEF**

(Commencing Construction of a Major Modification Without an NNSR Permit)

37. Paragraphs 1 through 36 are realleged and incorporated herein by reference.

38. Defendants commenced construction of one or more major modifications between June 15, 2004 and May 16, 2007, which affected the boilers and associated equipment at the De



Young Plant. Each such major modification resulted in significant net emission increases of nitrogen oxides (NOx).

**THIRD CLAIM FOR RELIEF**  
(Declaratory Relief)

39. Paragraphs 1 through 38 are realleged and incorporated herein by reference.

40. Pursuant to 28 U.S.C. §§ 2201 and 2202, Sierra Club is entitled to a declaration that Defendants violated the Act by commencing one or more major modifications of the De Young Plant without a PSD permit or an NNSR permit, that the De Young Plant is a modified source for purposes of the PSD and/or NNSR programs, and such further necessary or proper relief as may be granted by the Court.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Sierra Club respectfully prays for this Court to:

- A. Declare that the Defendants were required to obtain a PSD permit for the changes to the De Young Plant described above;
- B. Declare that the Defendants were required to obtain an NNSR permit for the changes to the De Young Plant described above;
- C. Declare that the De Young Plant is a modified source for purposes of the PSD program;
- D. Enjoin Defendants from operating the De Young Plant unless and until Defendants apply for and obtain a lawfully-issued PSD permit and NNSR permit;

E. Order the Defendants to apply for permits that are in conformity with the requirements of the PSD provisions of the Act for each modification that Defendants commenced without first obtaining a PSD permit;

F. Order the Defendants to remedy their past violations by, *inter alia*, requiring the Defendants to install, as appropriate, the necessary pollution controls to meet best available control technology emission limits;

G. Order the Defendants to take appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations of the Act alleged above;

H. Order the Defendants to conduct audits of their operations to determine if any additional modifications have occurred that would require them to meet the PSD requirements and to report the results of these audits to Sierra Club and the EPA;

I. Order the Defendants to pay civil penalties, including a beneficial mitigation project pursuant to 42 U.S.C. § 7604(g)(2);

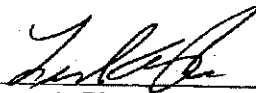
J. Order the Defendants to pay Sierra Club's costs of this action, including reasonable attorney fees, pursuant to CAA § 304(d), 42 U.S.C. § 7604(d);

K. Retain jurisdiction over this action to ensure compliance with the Court's Order;  
and

L. Any other relief that the Court finds is just and equitable.

Respectfully submitted this 12<sup>th</sup> day of December, 2008.

CULLEN WESTON PINES & BACH LLP



Lester A. Pines  
Wisconsin State Bar No. 1016543  
Kira E. Loehr  
Wisconsin State Bar No. 1042899  
122 West Washington Avenue, Suite 900  
Madison, WI 53703  
Telephone: (608) 251-0101  
Facsimile: (608) 251-2883  
[pines@cwpb.com](mailto:pines@cwpb.com)  
[loehr@cwpb.com](mailto:loehr@cwpb.com)

GARVEY MCNEIL & MCGILLIVRAY, S.C.

David C. Bender  
Wisconsin State Bar No. 1046012  
Christa Westerberg  
Wisconsin State Bar No. 1040530  
634 W. Main Street, Ste 101  
Madison, WI 53703  
Telephone: (608) 256-1003  
Facsimile: (608) 256-0933  
[bender@gmmattorneys.com](mailto:bender@gmmattorneys.com)  
[westerberg@gmmattorneys.com](mailto:westerberg@gmmattorneys.com)

*Attorneys for the Plaintiff Sierra Club*

JS 44 (Rev. 12/07)

## CIVIL COVER SHEET

1:08-cv-1183

Paul L Maloney  
Chief U.S. District Judge

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or of local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

Sierra Club

(b) County of Residence of First Listed Plaintiff San Francisco  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

See attachment

## DEFENDANTS

City of Holland, Michigan  
Holland Board of Public Works

County of Residence of First Listed Defendant Ottawa  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☒ 3 Federal Question (U.S. Government Not a Party)  
☐ 2 U.S. Government Defendant  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

- |   |  |   |  |  |  |
|---|--|---|--|--|--|
| <input type="checkbox"/> 110 Insurance  | <input type="checkbox"/> 310 Airplane                          | <input type="checkbox"/> 362 Personal Injury - Med. Malpractice         | <input type="checkbox"/> 610 Agriculture                                 | <input type="checkbox"/> 422 Appeal 28 USC 158                   | <input type="checkbox"/> 400 State Reapportionment                                     |
| <input type="checkbox"/> 120 Marine   | <input type="checkbox"/> 315 Airplane Product Liability        | <input type="checkbox"/> 365 Personal Injury - Product Liability        | <input type="checkbox"/> 620 Other Food & Drug                           | <input type="checkbox"/> 423 Withdrawal 28 USC 157               | <input type="checkbox"/> 410 Antitrust   |
| <input type="checkbox"/> 130 Miller Act   | <input type="checkbox"/> 320 Assault, Libel & Slander          | <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability | <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 | <input type="checkbox"/> 820 Copyrights                          | <input type="checkbox"/> 430 Banks and Banking   |
| <input type="checkbox"/> 140 Negotiable Instrument                                | <input type="checkbox"/> 330 Federal Employers' Liability      | <input type="checkbox"/> 370 Other Fraud                                | <input type="checkbox"/> 630 Liquor Laws                                 | <input type="checkbox"/> 830 Patent                              | <input type="checkbox"/> 450 Commerce  |
| <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment    | <input type="checkbox"/> 340 Marine                            | <input type="checkbox"/> 371 Truth in Lending                           | <input type="checkbox"/> 640 R.R. & Truck                                | <input type="checkbox"/> 840 Trademark                           | <input type="checkbox"/> 460 Deportation   |
| <input type="checkbox"/> 151 Medicare Act   | <input type="checkbox"/> 345 Marine Product Liability          | <input type="checkbox"/> 380 Other Personal Property Damage             | <input type="checkbox"/> 650 Airline Regs.                               | <input type="checkbox"/> 861 HIA (1395H)                         | <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations            |
| <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) | <input type="checkbox"/> 350 Motor Vehicle                     | <input type="checkbox"/> 385 Property Damage Product Liability          | <input type="checkbox"/> 660 Occupational Safety/Health                  | <input type="checkbox"/> 862 Black Lung (923)                    | <input type="checkbox"/> 480 Consumer Credit   |
| <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits        | <input type="checkbox"/> 355 Motor Vehicle Product Liability   | <input type="checkbox"/> 510 Motions to Vacate Sentence                 | <input type="checkbox"/> 690 Other                                       | <input type="checkbox"/> 863 DTWC/DFWW (405(g))                  | <input type="checkbox"/> 490 Cable/Sat TV  |
| <input type="checkbox"/> 160 Stockholders' Suits                                  | <input type="checkbox"/> 360 Other Personal Injury             | <input type="checkbox"/> 530 General                                    | <input type="checkbox"/> 710 Fair Labor Standards Act                    | <input type="checkbox"/> 864 SSID Title XVI                      | <input type="checkbox"/> 810 Selective Service   |
| <input type="checkbox"/> 190 Other Contract                                       | <input type="checkbox"/> 441 Voting                            | <input type="checkbox"/> 535 Death Penalty                              | <input type="checkbox"/> 720 Labor/Mgmt. Relations                       | <input type="checkbox"/> 865 RSI (405(g))                        | <input type="checkbox"/> 850 Securities/Commodities/Exchange                           |
| <input type="checkbox"/> 195 Contract Product Liability                           | <input type="checkbox"/> 442 Employment                        | <input type="checkbox"/> 540 Mandamus & Other                           | <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act      | <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) | <input type="checkbox"/> 875 Customer Challenge 12 USC 3410                            |
| <input type="checkbox"/> 196 Franchise  | <input type="checkbox"/> 443 Housing/Accommodations            | <input type="checkbox"/> 550 Civil Rights                               | <input type="checkbox"/> 740 Railway Labor Act                           | <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609         | <input type="checkbox"/> 890 Other Statutory Actions                                   |
| <input type="checkbox"/> 210 Land Condemnation                                    | <input type="checkbox"/> 444 Welfare                           | <input type="checkbox"/> 555 Prison Condition                           | <input type="checkbox"/> 790 Other Labor Litigation                      |  | <input type="checkbox"/> 891 Agricultural Acts   |
| <input type="checkbox"/> 220 Foreclosure  | <input type="checkbox"/> 445 Amer. w/Disabilities - Employment |   | <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act                |  | <input type="checkbox"/> 892 Economic Stabilization Act                                |
| <input type="checkbox"/> 230 Rent Lease & Ejectment                               | <input type="checkbox"/> 446 Amer. w/Disabilities - Other      |   | <input type="checkbox"/> 462 Naturalization Application                  |  | <input type="checkbox"/> 893 Environmental Matters                                     |
| <input type="checkbox"/> 240 Torts to Land  | <input type="checkbox"/> 440 Other Civil Rights                |   | <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee              |  | <input type="checkbox"/> 894 Energy Allocation Act                                     |
| <input type="checkbox"/> 245 Tort Product Liability                               |  |   | <input type="checkbox"/> 465 Other Immigration Actions                   |  | <input type="checkbox"/> 895 Freedom of Information Act                                |
| <input type="checkbox"/> 290 All Other Real Property                              |  |   |  |  | <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice |
|   |  |   |  |  | <input type="checkbox"/> 950 Constitutionality of State Statutes                       |

## V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding  
☐ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

42 U.S.C. 7604

Brief description of cause:

Civil enforcement of the Clean Air Act pursuant to citizen suit provision

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23  
DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☒ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE